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ADHESION THEORY IN CALIFORNIA: AN UPDATE

by Richard P. Sybert*

I. INTRODUCTION

In 1978, the author published an article in this journal entitled *Adhesion Theory in California: A Suggested Redefinition and Its Application to Banking*,¹ which surveyed California law on contracts of adhesion. Contracts of adhesion are standardized form contracts which are offered by the stronger of the contracting parties on a "take-it-or-leave-it" basis.² The earlier article considered application of the law of adhesion contracts to form contracts in the banking industry.³ It suggested that the doctrine of adhesion contracts, which in some instances had been phrased as a substantive rule of law to meet the "reasonable expectations" of the weaker of the contracting parties,⁴ should be redefined as basically a notice requirement, with substantive objections to contract terms to be dealt with under the legal heading of

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1. 11 LOY. L.A.L. REV. 297 (1978) [hereinafter cited as Sybert]. The article has since been cited by the California Supreme Court in *Graham v. Scissor-Tail, Inc.*, 28 Cal. 3d 807, 623 P.2d 165, 171 Cal. Rptr. 604 (1981), and by the Alaska Supreme Court in *Burgess Constr. Co. v. Alaska*, 614 P.2d 1380 (1980).

2. Contracts of adhesion have been defined in a variety of ways in reported California decisions. See, e.g., *Neal v. State Farm Ins. Cos.*, 188 Cal. App. 2d 690, 694, 10 Cal. Rptr. 781, 784 (1st Dist. 1961) ("A standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it."); *Steven v. Fidelity & Cas. Co.*, 58 Cal. 2d 862, 882, 377 P.2d 284, 297, 27 Cal. Rptr. 172, 185 (1962) ("The term refers to a standardized contract prepared entirely by one party to the transaction for the acceptance of the other; such a contract, due to the disparity in bargaining power between the draftsman and the second party, must be accepted or rejected by the second party on a 'take it or leave it' basis, without opportunity for bargaining and under such conditions that the 'adherer' cannot obtain the desired product or service save by acquiescing in the form agreement.").

3. Sybert, *supra* note 1, at 328-31. The form contracts considered included those involving bank service charges, stop payments on guaranteed checks, and changes in existing contracts such as credit cards.

4. *Id.* at 305 n.59. See also *id.* at 309-10 (formulation of adhesion "principles").

unconscionability.⁵

The present article traces developments in adhesion theory in California over the past four years.⁶ There have been relatively few decisions during that period. However, a group of new cases concerning arbitration clauses has for the first time threatened to apply adhesion theory to commercial settings, whereas previously it has been largely

5. *Id.* at 321-23.

6. The prior article did not address a number of cases decided prior to 1978. These included *Fresno Economy Import Used Cars, Inc. v. United States Fidelity & Guar. Co.*, 76 Cal. App. 3d 272, 142 Cal. Rptr. 681 (5th Dist. 1977); *Gamer v. duPont Glore Forgan, Inc.*, 65 Cal. App. 3d 280, 135 Cal. Rptr. 230 (4th Dist. 1976); *University of Judaism v. Transamerica Ins. Co.*, 61 Cal. App. 3d 937, 132 Cal. Rptr. 907 (2d Dist. 1976); *Powell v. Central Cal. Fed. Sav. & Loan Assn.*, 59 Cal. App. 3d 540, 130 Cal. Rptr. 635 (3d Dist. 1976); *Union Bank v. Ross*, 54 Cal. App. 3d 290, 126 Cal. Rptr. 646 (2d Dist. 1976).

In *Gamer*, the plaintiff, a lawyer, appealed from a judgment in favor of the defendant in a class action to recover allegedly usurious interest paid on a securities margin account. He attacked the choice-of-law provision in the agreement between the parties on the grounds that the contract was one of adhesion. The court of appeal affirmed the judgment, finding that the choice-of-law provision was not invalid as a matter of law simply because it was contained in a contract of adhesion. The court stated that the "plaintiff did not say he did not read the contract he signed, did not say that any of its clauses was not understood, or was contrary to what he expected, did say that subsequently he examined so-called 'customer agreements' from five other brokerages . . . substantially identical to the form signed by me." 65 Cal. App. 3d at 286, 135 Cal. Rptr. at 233. The court held that standardized forms were valid and enforceable according to their terms unless they were ambiguous, even if adhesion contracts. "It requires more than a showing that a contract was on a printed form prepared by one of the parties to make it invalid as a contract of adhesion. Very many of the contracts upon which people generally rely and whose provisions are performed faithfully by both parties are on such forms." *Id.* Thus, the court followed the proposal set forth in the earlier article that "contracts of adhesion" will be enforced if there is notice, if the adherer understands that notice, and if there are no ambiguous terms or unconscionable clauses.

In *Powell*, the court rejected the contention by plaintiff borrowers, real estate developers and financiers that a loan agreement provision, permitting a savings and loan association to raise or lower the interest rate according to that paid its own depositors, was illusory and invalid as part of a contract of adhesion. The court found that the plaintiffs had read the contract and understood it, because they were "sophisticated borrowers in the field of real estate development," and had a choice of source of loans available to them. 59 Cal. App. 3d at 551, 130 Cal. Rptr. at 641. The court noted, "[t]here is nothing sinful or illegal about a contract of adhesion; the only significant result of the existence of such a contract is that it is interpreted against the supplier of the goods or services (who prepared it) so as to meet the reasonable expectations of the customer." *Id.*, 130 Cal. Rptr. at 642 (citation omitted). Again, this comports with the earlier proposal.

In *Union Bank v. Ross*, the court held that exclusionary clauses and provisions limiting liability, between parties of unequal bargaining strength, "are ineffective in the absence of a plain and clear notification to the public, and an understanding consent." 54 Cal. App. 3d at 296, 126 Cal. Rptr. at 649-50. The court held, however, that the plaintiff "may not properly argue that he did not give an understanding consent because he failed to read the contract." The bank could not be responsible for such failure. *Id.*, 126 Cal. Rptr. at 650.

limited to consumer cases.⁷ These same cases, however, have been explicitly decided as "unconscionability" or due process cases, notwithstanding the presence of dicta concerning adhesion contracts. There is some hope, therefore, that adhesion theory will be limited to procedure.

II. TRADITIONAL ADHESION THEORY IN CALIFORNIA

Adhesion contracts are form contracts, usually offered to the general public on a "take-it-or-leave-it" basis. Although they are clearly susceptible to overreaching by the stronger party who writes the terms, contracts of adhesion are by no means inherently evil. To the contrary, as this author noted previously:

Through advance knowledge on the part of the enterprise offering the contract that its relationship with each individual consumer or offeree will be uniform, standard and fixed, the device of form contracts introduces a degree of efficiency, simplicity, and stability. When such contracts are used widely, the savings in cost and energy can be substantial. An additional benefit is that the goods and services which are covered by these contracts are put within the reach of the general public, whose sheer size might prohibit widespread distribution if the necessary contractual relationships had to be individualized. Transactional costs, and therefore the possible prices of these goods and services, are reduced.

In short, form contracts appear to be a necessary concomitant of a sophisticated, mass-consumption economy. They have social and economic utility.⁸

Moreover, there is no way to redress the adhesive nature of such contracts, since disparity of bargaining power is a function of status, not particular contract terms.⁹

Thus, adhesion contracts are here to stay. In response, California courts have fashioned a specialized "adhesion theory," permitting them to conform adhesive contract terms to the weaker party's "reasonable

7. See *infra* notes 34-35 and accompanying text.

8. Sybert, *supra* note 1, at 298, *quoted in* *Graham v. Scissor-Tail, Inc.*, 28 Cal. 3d at 818 n.15, 623 P.2d at 171 n.15, 171 Cal. Rptr. at 610 n.15.

9. Sybert, *supra* note 1, at 314: "[T]he judicial system is not designed to remake the fabric of society. It cannot undo the adhesive nature of a contract because it has no power to equalize bargaining strength to the point of ensuring genuine negotiation. It cannot break General Motors down to the economic level of John Doe." *Id.*

In some instances the California Legislature has enacted statutory forms of certain kinds of contracts, *e.g.*, swimming pool sales, retail installment contracts for car purchases, but this then simply makes the agreement adhesive for both parties.

expectations.”¹⁰ Despite a rule of such potentially sweeping substance, however, most of the adhesion cases have been decided by using the familiar rule that ambiguities are construed against the drafting party.¹¹ As put by one court, “despite the fact that contracts of adhesion are the product of mass production and afford the party to whom they are tendered little, if any, room in which to bargain, they are perfectly valid and, in the absence of ambiguity, are enforced according to their terms.”¹² Further, the “reasonable expectations” test has been narrowed even more by being framed in terms of a notice provision rather than a substantive rule of law; it has been held that in an adhesion setting, contract terms—usually exculpatory or limiting clauses on the stronger party’s liability or performance—which do not meet the weaker party’s “reasonable expectations,” must be the subject of clear notice if they are to be held effective.¹³

The earlier article concluded that the California cases supported a series of general principles:

The adhesion theory rationale is that the stronger party may not limit its liability performance, as defined either by law or by its representations, and towards this end,

(1) [a]ny ambiguity in an objectionable adhesive term will be seized upon and construed most strictly against the drafter;

(2) [a]n unusual or unexpected term in an adhesion contract which falls outside the weaker party’s “reasonable expectations” will be denied effect against him, unless it has been brought to his attention by express notice, as by clear, plain and conspicuous language on the face of the contract;

(3) [i]f an unreasonable adhesive term is unambiguous and has been brought to the attention of the weaker party, a court may still delete it on equitable grounds, as against public policy.¹⁴

The earlier article criticized this approach as affording courts too much latitude to rewrite substantive provisions in contracts, as “inherently unfair and unpredictable because of the subjective nature of ‘reasonable expectations,’” and as unnecessary to the extent

10. Sybert, *supra* note 1, at 305-06 & n.59.

11. *Id.* at 306 n.64, 307.

12. *Yeng Sue Chow v. Levi Strauss & Co.*, 49 Cal. App. 3d 315, 325, 122 Cal. Rptr. 816, 822 (1st Dist. 1975) (emphasis deleted).

13. Sybert, *supra* note 1, at 308-09.

14. *Id.* at 309-10.

unconscionability or other equitable doctrines were available to reach the same result.¹⁵ Instead, the article suggested that an explicit procedural approach be taken to require clear notice of all terms in *truly* adhesive contracts (no choice as to terms, *and* no reasonable or meaningful choice as to the substantive transaction) of a "public nature,"¹⁶ and otherwise to treat a contract of adhesion no differently from any other contract:

The proposal, then, is to confirm the utility of a specialized approach to contracts that are truly adhesive—those transactions which the weaker party realistically must enter and whose terms he must accept—and to redefine or confirm the nature of that approach, adhesion theory, as essentially procedural and as one going to notice.

This proposal might be set forth as follows:

1. Standard rules for construction and interpretation of contracts, including the rule construing ambiguities against the drafter, apply to truly adhesive contracts exactly as they do to any others.

2. Terms in truly adhesive contracts of a public nature that shock the conscience will be stricken on grounds of public policy applicable to such contracts particularly, or on grounds of unconscionability applicable to all contracts. A truly adhesive contract will be deemed to be of a public nature if it satisfies the first or a number of the *Tunkl* criteria, or has been assigned that status by non-adhesion theory judicial

15. *Id.* at 312.

16. *Id.* at 321; see *Tunkl v. Regents of the Univ. of Cal.*, 60 Cal. 2d 92, 383 P.2d 441, 32 Cal. Rptr. 33 (1963), the first important California adhesion case, setting forth a number of factors to determine whether a transaction reaches the public interest. In that case, a hospital sought to exempt itself from liability through a hospital admission procedure:

It concerns a business of a type generally thought suitable for public regulation. The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public. The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards. As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services. In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence As a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents.

Id. at 98-101, 383 P.2d at 445-46, 32 Cal. Rptr. at 37-38 (footnotes omitted).

decision (e.g., antitrust determination of monopoly) or by legislative indication.

3. All terms in truly adhesive contracts of a public nature must be presented to the weaker party in a clear, understandable and noticeable way, such that a reasonable person would be apprised of them.

4. If there has been no effective notice of a given term, and it is not reasonable, the adherer will not be bound by it.¹⁷

How, then, have California courts run with adhesion theory in the last several years? As we see below, in different directions at once.

III. THE NEW CASES

A. *Voices from the Past*: Jones v. Crown Life; Meyers v. Guarantee Savings and Loan

Two of the recent cases demonstrate the different applications of adhesion theory as it has traditionally been applied, one application being expansive and substantively oriented, and the other restrictive and procedurally oriented.

In *Jones v. Crown Life Insurance Co.*,¹⁸ the court of appeal followed traditional application of adhesion theory in California. An 18 year-old employee of a lumber company died in a traffic accident at 12:30 in the morning when his car went off the road at approximately 80 m.p.h. around a curve in a 35 m.p.h. zone. There was evidence, including analysis of blood alcohol content, that the deceased was intoxicated and incapable of safely operating a car at the time.

The victim had been covered by an employer-sponsored group life and health insurance program which provided for additional payment benefits in case of accidental death. Employees were afforded the opportunity to read a copy of the policy in the employer's office, but were not given a copy themselves. Instead, they were given a booklet written by the staff of the defendant insurer which described the policy, but omitted any mention of a provision which excluded the additional accidental death benefit if the employee had committed a criminal offense (*i.e.*, such as drunk driving) which contributed to his or her demise.

The court of appeal affirmed the judgment in favor of the employee's estate that the additional benefit should be paid. The insurance program contract was adhesive since the employees either had to

17. Sybert, *supra* note 1, at 321.

18. 86 Cal. App. 3d 630, 150 Cal. Rptr. 375 (1st Dist. 1978).

accept the plan or "contract individually for health and life insurance at a much higher rate."¹⁹ Further, the employer had not negotiated the policy, but had merely selected one from among the seven insurance companies considered, three or four of which offered the same coverage. Finally, the provision in question limited the insurer's obligations, rather than merely changing dispute forums.²⁰ Therefore, the limitation was ineffective, and the additional benefit was payable, since the deceased's "reasonable expectations" would have been that he was covered.

The decision in *Jones* demonstrates precisely the problems with adhesion theory that were discussed in the earlier article: the "reasonable expectations" test, rather than being an objective standard, is subject to manipulation. As the defendant in *Jones* unsuccessfully argued, "no reasonable person could expect coverage for his death when his death results from the operation of a motor vehicle at an excessive speed on a two-lane road while under the influence of alcohol."²¹ Yet the *Jones* court rejected this evident proposition and substantially rewrote the contract.²² No doubt this resulted in higher insurance costs for all employees, including those whose drinking habits were less irresponsible.²³

19. *Id.* at 638, 150 Cal. Rptr. at 378.

20. This was unlike the arbitration clause in question in an earlier case, *Madden v. Kaiser Found. Hosp.*, 17 Cal. 3d 699, 552 P.2d 1178, 131 Cal. Rptr. 892 (1976). See Sybert, *supra* note 1, at 302. The *Jones* court further distinguished *Madden* in that the group medical plan in that case was held not to be adhesive, where the employee's retirement group had equal bargaining strength with the insurer or health provider, and where the individual employee was offered the choice between several different medical plans as well as the opportunity to contract individually for his own. *Jones*, 86 Cal. App. 3d at 637, 150 Cal. Rptr. at 378.

The *Madden* court had identified three factors in "the characteristic adhesion contract case:"

[1] [T]he stronger party drafts the contract, and the weaker has no opportunity . . . to negotiate concerning its terms

[2] In many cases of adhesion contracts, the weaker party lacks . . . also any realistic opportunity to look elsewhere for a more favorable contract; he must either adhere to the standardized agreement or forego the needed service

[3] Finally, in all prior contract of adhesion cases, the courts have concerned themselves with weighted contractual provisions which served to limit the obligations or liability of the stronger party.

17 Cal. 3d at 711, 552 P.2d at 1185-86, 131 Cal. Rptr. at 889-90.

21. 86 Cal. App. 3d at 640, 150 Cal. Rptr. at 380.

22. *But cf.* *Logan v. John Hancock Mut. Life Ins. Co.*, 41 Cal. App. 3d 988, 116 Cal. Rptr. 528 (1974) (insured would not have reasonably expected noncoverage in case of death while intoxicated).

23. The *Jones* decision continues the ill-advised approach taken by the California Supreme Court in *Steven v. Fidelity & Casualty Co.*, 58 Cal. 2d 862, 377 P.2d 284, 27 Cal. Rptr. 172 (1962), which was criticized by the earlier article for the same reason. See discus-

The 1978 case of *Meyers v. Guarantee Savings and Loan Association*²⁴ stands in sharp contrast to *Jones*. It exemplifies the application of traditional adhesion theory in a strict procedural manner, cast solely in terms of notice, as suggested by the earlier article. *Meyers* involved an action by a builder to foreclose his mechanics lien against defendants' partially constructed house. The defendants cross-complained against the savings and loan association which had financed the construction, charging that monies had been paid to the contractor wrongfully and without the required inspection of the work. The savings and loan brought a motion for summary judgment.

The homeowner defendants argued that under the loan agreement, the lender had a duty to inspect the construction and that if it failed to do so but continued to make payments to the contractor, it would be liable for the damages. The terms of the loan agreement, however, stated that the lender was *not* required to make any such inspections. Accordingly, summary judgment was granted. On appeal, the homeowner attempted to avoid the contract language by characterizing the agreement as adhesive, but the court of appeal found that he had read and understood the contract, that there was no ambiguity or uncertainty in it, and that his alleged subjective expectations were therefore not objectively reasonable. Adhesion contracts, the court ruled, were enforceable according to their terms absent any ambiguities.²⁵

Thus, the decision in *Meyers* focuses, as the earlier article suggested, on the adherer's *notice* of the challenged term. The court did not indulge in the opportunity to decide what a homeowner's "reasonable expectations" *should* be. Perhaps it was foreclosed from doing so, since, unlike *Steven*²⁶ and *Jones*, the homeowner had actually read the contract. The tone of the decision does not indicate that the court would have been so inclined in any event.

sion in *Sybert*, *supra* note 1, at 315-16. In *Steven*, the plaintiff had purchased a standardized air traveller's insurance policy from an airport vending machine. He had then taken a small chartered airplane instead of his scheduled flight, and died when the plane crashed because of bad weather which had grounded all scheduled carriers. The policy did not cover unscheduled flights. In the majority opinion, Justice Tobriner found coverage on the ground that the insured would have reasonably expected it, and because the coverage exclusion had not been brought home to him. Chief Justice Traynor dissented on the ground that a purchaser would not reasonably expect coverage for other than scheduled carriers. The earlier article submitted that Justice Traynor was right. Cases like *Steven* and *Jones* demonstrate the dangers of a "reasonable expectations" test because it is highly subjective and capable of being manipulated to reach the "right" result.

24. 79 Cal. App. 3d 307, 144 Cal. Rptr. 616 (5th Dist. 1978).

25. *Id.* at 312, 144 Cal. Rptr. at 619 (citing *Yeng Sue Chow v. Levi Strauss & Co.*, 49 Cal. App. 3d at 315, 325, 122 Cal. Rptr. 816, 822 (1st Dist. 1975)); *see supra* note 12.

26. *See supra* note 23.

B. The Arbitration Cases

Since 1978 California courts have rendered a number of decisions concerning arbitration provisions in contracts of adhesion. *Beynon v. Garden Grove Medical Group*²⁷ follows earlier trends of applying adhesion theory to cases which usually involve other factors as well.²⁸ In *Steven*, for example, the court emphasized the fact that the air traveller had to buy his insurance policy before reading it.²⁹ In another important adhesion case, *Tunkl v. Regents of the University of California*,³⁰ the court based its holding on California Civil Code section 1668,³¹ which specifically addresses exculpatory clauses; the adhesive nature of the transaction was simply listed as one of a series of factors to be considered.³²

A second "arbitration" case, *Graham v. Scissor-Tail, Inc.*,³³ followed by a third, *Hope v. Superior Court*,³⁴ is more startling in its application of adhesion theory to commercial settings. Although there may be a contract of adhesion in a commercial setting if the required elements, such as bargaining disparity, are present,³⁵ adhesion theory is generally applied in consumer settings because of the greater disparity of bargaining power,³⁶ and no doubt because of the courts' greater willingness to protect non-business parties.

Beynon, *Graham* and *Hope* are significant in that all three cases ignored indications that the parties were *not* unequal in bargaining power. Thus, these decisions may herald an even greater, unwelcome activism by California courts in overriding the contract process and in

27. 100 Cal. App. 3d 698, 161 Cal. Rptr. 146 (4th Dist. 1980).

28. Sybert, *supra* note 1, at 312-13 nn.103-06.

29. See *supra* note 23.

30. 60 Cal. 2d 92, 383 P.2d 441, 32 Cal. Rptr. 33 (1963).

31. CAL. CIV. CODE § 1668 (West 1973) states: "All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law."

32. 60 Cal. 2d at 99-100, 383 P.2d at 445-46, 32 Cal. Rptr. at 37-38.

33. 28 Cal. 3d 807, 623 P.2d 165, 171 Cal. Rptr. 604 (1981).

34. 122 Cal. App. 3d 147, 175 Cal. Rptr. 851 (1st Dist. 1981), *cert. denied*, 456 U.S. 910 (1982).

35. See, e.g., *Player v. George M. Brewster & Son, Inc.*, 18 Cal. App. 3d 526, 96 Cal. Rptr. 149 (3d Dist. 1971) (contractor and subcontractor). It is the inequality of bargaining power, not the commercial or consumer characterization, which is ostensibly the determinative factor. See Sybert, *supra* note 1, at 303 n.48. This could also explain the result in *Scissor-Tail*, see *supra* note 32, where third-party, union power dictated contract terms and deprived either side of bargaining. It is simply that such inequality is usually found in consumer contexts. Sybert, *supra* note 1, at 303.

36. Sybert, *supra* note 1, at 303.

substantively rewriting private agreements.³⁷ The *Beynon* decision in particular is subject to this criticism. However, *Graham* and *Hope* also show a far greater recognition of the role of unconscionability in adhesion cases. These cases, therefore, offer the prospect that adhesion theory may finally be restricted to its proper, procedural niche, and that courts can be more candid about their grounds for invalidating substantive contract provisions.

In *Beynon*, the plaintiff employee was covered under a group health care plan which had been entered into by a health care provider and an employer group of which plaintiff's employer was apparently a member. Plaintiff had submitted an application card seeking membership in the plan "as described in the master agreement and policy."³⁸ She was given a descriptive brochure stating that "[d]isputes involving matters pertaining to the prepaid plans and care received or refused must be submitted to arbitration in accordance with the Agreement."³⁹ She was never provided with a copy of the actual policy. The policy contained provisions for mandatory arbitration of disputes by a three-arbitrator panel composed of one nominee selected by each side, and a third selected by the first two arbitrators.⁴⁰ However, the policy also permitted the health care provider to reject the arbitrators' decision if it was dissatisfied, and to resubmit the matter to a second panel consisting of three doctors selected in the same manner.⁴¹

The plaintiff sued the health care provider for malpractice following surgery. Her case was referred to arbitration and she won. The provider, however, rejected the arbitration award pursuant to the policy provisions. The plaintiff then brought an action to confirm the award, claiming that the provisions for rearbitration were void both as a contract of adhesion and as against public policy.⁴² This position was rejected by the trial court, but accepted on appeal.⁴³ The court of appeal, citing to *Jones v. Crown Life Insurance Co.*, ruled that "there was no evidence that the agreement was negotiated by parties having a parity of bargaining strength or that plaintiff had a realistic opportunity to

37. *Id.* at 312-15.

38. 100 Cal. App. 3d at 702, 161 Cal. Rptr. at 148.

39. *Id.* at 705, 161 Cal. Rptr. at 150.

40. *Id.* at 703 n.2, 161 Cal. Rptr. at 148-49 n.2.

41. The court, however, assertedly did not object to the makeup of the second panel, but to the provider's unilateral power to reject the decision of the first panel without cause and to require rearbitration. *Id.* at 712 n.9, 161 Cal. Rptr. at 154 n.9.

42. *Id.* at 703-04, 161 Cal. Rptr. at 148-49.

43. *Id.*

bargain or to seek a more favorable contract.”⁴⁴ It was “manifest” that the arbitration provisions providing for resubmission “unreasonably limit[ed] the obligations of the health plan and health care provider and defeat[ed] the reasonable expectations of one enrolling in the plan.”⁴⁵ Therefore, the court reasoned that since the contract “possesses the attributes of a contract of adhesion,” the plaintiff was not bound.⁴⁶

Several observations with regard to the *Beynon* court’s reasoning are immediately apparent. First, it ran roughshod over the question of bargaining power; the employer’s group, not the individual employee, had negotiated the agreement. The court, however, treated the facts as if the two negotiating parties, the employer’s group and the health care provider, were on the same side, and the employee on the other. The court made the astonishing statement that, bargaining power or agency principles notwithstanding, it would not tolerate contract provisions with which it substantively disagreed:

[T]he implied authority of an agent to do everything “proper and usual” to effectuate the purposes of the agency (Civ. Code, § 2319) cannot be stretched to authorize the inclusion in the master policy of the extraordinary provisions of [the arbitration] paragraph A provision granting a unilateral right to one party to reject an arbitration award without cause and to require rearbitration before a special panel is neither proper nor usual.⁴⁷

The result-oriented view of the court is plain, particularly since it permitted the first arbitration award to stand on the ground that the arbitration provisions were severable *inter se*.⁴⁸ There seems little doubt, however, given the tone of the decision, that had the plaintiff lost the first arbitration, the court would have been receptive to an adhesion attack on that provision as well.

Secondly, *Beynon* should never have been an “adhesion” case. Just as the prior article noted that many of the more important cases presented other factors such as public policy, statutory provisions, or unconscionability,⁴⁹ the *Beynon* court’s “real” ruling seemed to be: “We have concluded that the provisions . . . are violative of public

44. *Id.* at 705, 161 Cal. Rptr. at 150.

45. *Id.* at 706, 161 Cal. Rptr. at 150.

46. *Id.*

47. *Id.* at 707, 161 Cal. Rptr. at 151.

48. *Id.* at 712-13, 161 Cal. Rptr. at 155.

49. Sybert, *supra* note 1, at 312 nn.103-06, 317 nn.136-38. See discussion of *Tunkl, supra*, note 16.

policy and are therefore invalid. . . . [We declare] such fundamentally unfair and unreasonable provisions in a health service plan contract invalid on public policy grounds."⁵⁰ Noting that there was "widespread public reliance" on such contracts and that they had recently been subject to extensive statutory regulation,⁵¹ including a provision that all such contracts should be "fair, reasonable, and consistent" with statutory objectives⁵² which included rational and informed health consumer choices,⁵³ the court stated that it might "declare void as against public policy contracts which, though not specifically forbidden by the Legislature, are clearly injurious to society."⁵⁴ The court concluded, in a transparently self-serving *ipse dixit*:

[T]here is no judicial intrusion into the legislative prerogative in declaring the provisions [in question] . . . invalid on public policy grounds. The statutory standard that health care service contracts be "fair" and "reasonable" is but an expression of adhesion contract principles which courts have developed and applied over the years in the insurance context and an articulation of the spirit and purposes of the Knox-Mills Health Plan Act which the new act superseded.⁵⁵ In light of the almost universal public reliance upon prepaid health plan service contracts and insurance as a means of obtaining and paying for hospital and medical services, provisions which can render arbitration a one-sided procedure weighted against the subscriber are manifestly harmful to the public interest.⁵⁶

Clearly the court's real concern was with the substantive content of the rearbitration provision. It invalidated the provision, in reality, on public policy grounds or something akin to unconscionability. Why, then, was it necessary for the court to add gratuitously that the contract was one of adhesion, when it was probably not? Adhesion theory ostensibly goes, or should go, to contract *procedure*. Its use as a substan-

50. 100 Cal. App. 3d at 710, 161 Cal. Rptr. at 153.

51. CAL. HEALTH & SAFETY CODE §§ 1340-95 (West 1982); former CAL. GOV'T CODE § 12530-39.13; *see* 100 Cal. App. 3d at 710-11, 161 Cal. Rptr. at 153.

52. CAL. HEALTH & SAFETY CODE § 1367(h) (West 1979).

53. CAL. HEALTH & SAFETY CODE § 1342(b) (West 1982).

54. 100 Cal. App. 3d at 711-12, 161 Cal. Rptr. at 154 (citations omitted).

55. The 1965 Knox-Mills Act, former CAL. GOV'T CODE §§ 12530-39.7, had proscribed deceptive or misleading health plan membership contracts or advertising, *id.*, §§ 12531, 12532. These provisions were largely carried over into the Knox-Keane Act of 1975, specifically CAL. HEALTH & SAFETY CODE § 1360.

56. 100 Cal. App. 3d at 712, 161 Cal. Rptr. at 154.

tive tool is one of the major criticisms voiced in the earlier article.⁵⁷

Similar criticism can also be made of the decisions in *Graham v. Scissor-Tail, Inc.*,⁵⁸ and *Hope v. Superior Court*,⁵⁹ cases notable for their application of adhesion theory to commercial settings. *Scissor-Tail*, a decision by the California Supreme Court, involved two prominent business entities of apparently relatively equal bargaining strength in the field of music entertainment. Plaintiff Bill Graham was a promoter and organizer of rock concerts, and defendant Scissor-Tail, Inc., was the corporate marketing vehicle for rock star Leon Russell.⁶⁰ The two entered into a contract for a series of concerts, but Graham was apparently forced to use the musicians' union contract, a printed form with non-negotiable terms.⁶¹ The only negotiable terms were those as to playing dates and supporting musicians. Scissor-Tail was also effectively forced to use this contract, since all members of the musicians' union were obliged to use the same form. The contract required that any disputes had to be settled in arbitration by an arbitration panel appointed by the musicians' union.⁶²

A dispute did in fact arise between the parties, and a former executive of the union was appointed to arbitrate.⁶³ The award, as one might suspect, was in favor of the performer, and Graham challenged the arbitration provisions as the product of an unlawful contract of adhesion.⁶⁴

Even though Graham admitted that he had read and understood the contract, and had in fact used such contracts many times, the court ruled that his inability to obtain a neutral or impartial arbitrator made this part of the contract unenforceable.⁶⁵ Former union executives, the court held, would not provide a fair, unbiased arbitration hearing. Therefore, the arbitration clause was unconscionable and unenforceable because "minimum levels of integrity"⁶⁶ were not achieved.

The situation in *Scissor-Tail* is a little unusual in that the presence of a third party, the musicians' union, effectively ensured that there was

57. Sybert, *supra* note 1, at 312-15; see also discussion that adhesion theory may be covert unconscionability, *id.* at 317-18 n.138.

58. 28 Cal. 3d 807, 623 P.2d 165, 171 Cal. Rptr. 604 (1981).

59. 122 Cal. App. 3d 147, 175 Cal. Rptr. 851 (1st Dist. 1981).

60. 28 Cal. 3d at 812, 623 P.2d at 167, 171 Cal. Rptr. at 606.

61. *Id.* at 812-13, 818-19, 623 P.2d at 167-68, 172, 171 Cal. Rptr. at 607, 610-11.

62. *Id.* at 813, 623 P.2d at 168, 171 Cal. Rptr. at 607.

63. *Id.* at 815, 623 P.2d at 169, 171 Cal. Rptr. at 608-09.

64. *Id.* at 817, 623 P.2d at 170, 171 Cal. Rptr. at 609-10.

65. *Id.* at 821, 828, 623 P.2d at 173, 178, 171 Cal. Rptr. at 612-13, 617.

66. 28 Cal. 3d at 828, 623 P.2d at 178, 171 Cal. Rptr. at 617.

no bargaining and that the form contract was adhesive for *both* sides, although obviously it would favor the performer, if anyone. Perhaps this explains the application of adhesion theory to a commercial setting, with two parties possessing bargaining power. The case plainly represents an aberrant application of the doctrine of adhesion contracts because the arbitration clause most assuredly did not fail to meet the plaintiff's "reasonable expectations," since he had admittedly read the provision and in fact was quite familiar with it.

Instead, *Scissor-Tail*, like *Beynon*, is an *unconscionability* decision; the arbitration clause was invalid because it did not meet "minimum levels of integrity":

Generally speaking, there are two judicially imposed limitations on the enforcement of adhesion contracts or provisions thereof. The first is that such a contract or provision which does not fall within the reasonable expectations of the weaker or "adhering" party will not be enforced against him. (See, e.g., *Gray v. Zurich Insurance Co.* (1966) 65 Cal. 2d 263, 271-272, [54 Cal. Rptr. 104, 419 P.2d 168]; *Steven v. Fidelity & Casualty Co.* (1962) 58 Cal. 2d 862, 869-870, [27 Cal. Rptr. 172, 377 P.2d 284]; *Wheeler v. St. Joseph Hospital*, *supra*, 63 Cal. App. 3d 345, 357; see generally *Sybert*, *supra*, at pp. 305-306, and cases there cited.) *The second—a principle of equity applicable to all contracts generally—is that a contract or provision, even if consistent with the reasonable expectations of the parties, will be denied enforcement if, considered in its context, it is unduly oppressive or "unconscionable."* . . .

We cannot conclude on the record before us that the contractual provision requiring arbitration of disputes before the A.F. of M. was in any way contrary to the reasonable expectations of plaintiff Graham. By his own declarations and testimony, he had been a party to literally thousands of [such] contracts containing a similar provision; indeed it appears that during the 3 years preceding the instant contracts he had promoted 15 or more concerts with Scissor-Tail, on each occasion signing a contract containing arbitration provisions similar to those here in question. It also appears that he had been involved in prior proceedings . . . regarding disputes with other musical groups arising under prior contracts. Finally, the discussions taking place following the . . . concert, . . . all strongly suggest an abiding awareness on his part that all disputes arising under the contracts were to be resolved by

[such] arbitration For all of these reasons it must be concluded that the provisions requiring such arbitration . . . were wholly consistent with Graham's reasonable expectations upon entering into the contract.⁶⁷

However, the make-up of the designated arbitration panel was, in this case, so one-sided as to render the agreement to arbitrate "illusory": "[C]learly, 'minimum levels of integrity' are not achieved, and the 'agreement to arbitrate' should be denied enforcement *on grounds of unconscionability*."⁶⁸ The court also specified a second, related ground, that the provision effectively denied due process because it denied Graham a fair opportunity to be heard.⁶⁹ Thus, there was no need nor useful purpose to be served by invoking adhesion theory.

Scissor-Tail was followed by the case of *Hope v. Superior Court*.⁷⁰ In *Hope*, the petitioners were account executives who had been employed at a securities broker's office under a standardized securities account executive employment contract which provided that all disputes between employer and employee would be settled by a panel of arbitrators. The petitioners were given the option of being fired or resigning, chose the latter, and went to work for a competitor. They then brought an action for past due commissions and various business torts against their former employer, who invoked the arbitration clause in the employment contract.⁷¹

The court held that, as in *Scissor-Tail*, the panel of arbitrators was associated with one party (the employer) so as to be presumptively biased in his favor.⁷² In *Hope*, the form of the contract was imposed by a third party, the New York Stock Exchange, which was presumed to be similarly biased.⁷³ As in *Scissor-Tail*, the *Hope* court found that this arrangement failed to meet "minimal levels of integrity," and it was held invalid.⁷⁴ The court's analysis is for all intents and purposes the same as that of the court in *Scissor-Tail*:

67. *Id.* at 820-21, 623 P.2d at 172-73, 171 Cal. Rptr. at 611-12 (emphasis added, footnotes omitted).

68. *Id.* at 825, 623 P.2d at 176, 171 Cal. Rptr. at 615 (emphasis added).

69. *Id.* at 825-26, 623 P.2d at 176-77, 171 Cal. Rptr. at 615.

70. 122 Cal. App. 3d 147, 175 Cal. Rptr. 851.

71. *Id.* at 149, 175 Cal. Rptr. at 853.

72. *Id.* at 154, 175 Cal. Rptr. at 856.

73. *Id.*, 175 Cal. Rptr. at 856.

74. *Id.* at 155, 175 Cal. Rptr. at 856. *Cf.* *Dinong v. Superior Court*, 120 Cal. App. 3d 300, 174 Cal. Rptr. 590 (3d Dist. 1981), where it was held there was no obligation to select impartial arbitrators. In that case, however, each party had the right to select an arbitrator.

The employer-employee context in *Hope* is more akin to a consumer than a commercial setting because of the usual disparity of bargaining power.

We must also conclude on the basis of the standards set forth in *Scissor-Tail* that *the arbitration provisions contained in the contract were unconscionable, and therefore unenforceable. Whether or not those provisions were contrary to the reasonable expectations of the parties is an issue we cannot determine on this record*; but here, as in *Scissor-Tail*, the arbitral body is so associated with a party to the contract, i.e., Shearson, as to be presumptively biased in favor of that party.⁷⁵

Subsequent decisions have consistently referred to *Scissor-Tail* as an unconscionability or due process decision. In *Pascal & Ludwig, Inc. v. State of California*,⁷⁶ a building contractor unsuccessfully sought to compel the state to arbitrate certain disputes. The court stated that *Scissor-Tail* "holds that in a contract of adhesion an arbitration provision that would designate as sole arbitrator either an affected contractual party or one with identical interest in the outcome of the dispute is unconscionable and unenforceable as a matter of state law and policy."⁷⁷ In *Appalachian Insurance Co. v. Rivcom Corp.*,⁷⁸ the court, in rejecting a variety of attacks on an even-handed arbitration clause in an insurance policy, characterized *Scissor-Tail* as based on the denial of a fair opportunity to be heard.⁷⁹ In *Painters District Council No. 33 v. Moen*,⁸⁰ where the court permitted enforcement of a clause in a labor contract requiring submission of employment grievances and disputes to an unincorporated association of local painters' unions, with an arbitration panel equally representative of both sides, *Scissor-Tail* was similarly explained as a common law due process decision.⁸¹

These recent arbitration cases, however, because of their persistent use of adhesion language in analyses which are plainly ones of unconscionability or due process, offer only mixed hope that courts will cease the improper use of adhesion theory as a smoke screen or as an additional ground for a finding of unconscionability, contravention of public policy, or other ruling going to the substance of a contract. If anything, the new decisions indicate that such use is now spreading to the commercial area. There is no need for this application of adhesion theory; it derogates from the more desirable use of the theory as a procedural tool as recommended in the prior article and as followed in the

75. 122 Cal. App. 3d at 154, 175 Cal. Rptr. at 856 (emphasis added).

76. 127 Cal. App. 3d 178, 179 Cal. Rptr. 403 (1981).

77. *Id.* at 184, 179 Cal. Rptr. at 406.

78. 130 Cal. App. 3d 818, 182 Cal. Rptr. 11 (1982).

79. *Id.* at 828-29, 182 Cal. Rptr. at 16.

80. 128 Cal. App. 3d 1032, 181 Cal. Rptr. 17 (1982).

81. *Id.* at 1039 n.3, 181 Cal. Rptr. at 20 n.3.

Meyers case. The same results could be obtained with more direct reason and without saddling adhesion theory with the baggage of other substantive doctrines. Indeed, these recent cases are *not* adhesion decisions, and they should not be cited as such.

C. Commercial Unconscionability: A & M Produce Co. v. FMC Corp.

The decision of the court of appeal in August, 1982, in the case of *A & M Produce Co. v. FMC Corp.*,⁸² confirms rather explicitly that the "adhesion" decisions are really ones of unconscionability in sheep's clothing. The plaintiff in *A & M Produce* had bought agricultural processing equipment from the defendant FMC. The equipment failed to operate properly, and the plaintiff's crop was lost. The sales contract for the transaction was on FMC's pre-printed form that contained provisions on the back limiting and disclaiming warranties and consequential damages which FMC claimed at trial were effective to defeat plaintiff's claims. Both parties were commercial entities, albeit of different size; the plaintiff was a solely-owned farming company in California's Imperial Valley whose operations were dwarfed by those of the defendant multi-national corporation.

Plaintiff brought an action for breach of express and implied warranties.⁸³ At a third trial, following a hung jury in the first trial and a new trial ordered in the second, the superior court ruled that it would be unconscionable to enforce the warranty limitations. On the basis of this determination, it excluded evidence of the contents of the agreement's reverse side, on which the terms in question were located, and upheld a substantial general verdict.

The court of appeal's decision upholding the lower court's evidentiary ruling is prolix and couched in rather inartful language, and may well be criticized on other grounds as making bad law. But for purposes of adhesion theory, the court's decision makes it clear that the adhesive nature of a transaction is only one factor to be taken into account in determining unconscionability.

The court of appeal first denied that the failure to enact Section 2-302 of the Uniform Commercial Code in California prevented the application of the doctrine of unconscionability in this state. Citing both *Graham v. Scissor-Tail, Inc.*,⁸⁴ and *Steven v. Fidelity & Casualty Co.*,⁸⁵

82. 135 Cal. App. 3d 473, 186 Cal. Rptr. 114 (4th Dist. 1982).

83. *Id.* at 480, 186 Cal. Rptr. at 118.

84. See *supra* notes 58-69 and accompanying text.

85. See *supra* note 23.

as well as recently enacted Section 1670.5 of the California Civil Code, the court declared that "[u]nconscionability has long been recognized as a common law doctrine which has been consistently applied by California courts in the absence of specific statutory authorization."⁸⁶

The court engaged in a rather tortured discussion of what it called the two "elements" of unconscionability, "procedural" and "substantive," focusing on the adhesive nature of a contract or transaction as the key factor in the former.

The procedural element focuses on two factors: "oppression" and "surprise." . . . "Oppression" arises from an inequality of bargaining power which results in no real negotiation and "an absence of meaningful choice." . . . "Surprise" involves the extent to which the supposedly agreed-upon terms of the bargain are hidden in a prolix printed form drafted by the party seeking to enforce the disputed terms Characteristically, the form contract is drafted by the party with the superior bargaining position.

. . . .

Of course the mere fact that a contract term is not read or understood by the nondrafting party or that the drafting party occupies a superior bargaining position will not authorize a court to refuse to enforce the contract. Although an argument can be made that contract terms not actively negotiated between the parties fall outside the "circle of assent" which constitutes the actual agreement . . . commercial practicalities dictate unbargained-for terms only be denied enforcement where they are also *substantively* unreasonable No precise definition of substantive unconscionability can be proffered The most detailed and specific commentaries observe that a contract is largely an allocation of risks between the parties, and therefore that a contractual term is substantively suspect if it reallocates the risks of the bargain in a objectively unreasonable or unexpected manner But not all unreasonable risk reallocations are unconscionable; rather, enforceability of the clause is tied to the procedural aspects of unconscionability . . . such that the greater the unfair surprise or inequality of bargaining power, the less unreasonable the risk reallocation which will be tolerated.⁸⁷

86. 135 Cal. App. 3d at 485-86, 186 Cal. Rptr. at 121.

87. *Id.* at 486-87, 186 Cal. Rptr. at 122 (footnotes and citations omitted).

The court entered into a long discussion of *Graham v. Scissor-Tail, Inc.*⁸⁸ as an example of the case where these elements had been pulled together to determine that the clause in question did not meet "minimal levels of integrity." It then turned to the facts of its own case, and disposed of the notion that the commercial context in which the transaction in question had occurred somehow lessened the court's review power.

Turning first to the procedural aspects of unconscionability, we note at the outset that this contract arises in a commercial context between an enormous diversified corporation (FMC) and a relatively small but experienced farming company (A & M). Generally, "courts have not been solicitous of businessmen in the name of unconscionability." . . . This is probably because courts view businessmen as possessed of a greater degree of commercial understanding and substantially more economic muscle than the ordinary consumer. Hence, a businessman usually has a more difficult time establishing procedural unconscionability in the sense of either "unfair surprise" or "unequal bargaining power."

Nevertheless, generalizations are always subject to exceptions With increasing frequency, courts have begun to recognize that experienced but legally unsophisticated businessmen may be unfairly surprised by unconscionable contract terms . . . and that even large business entities may have *relatively* little bargaining power, depending on the identity of the other contracting party and the commercial circumstances surrounding the agreement This recognition rests on the conviction that the social benefits associated with freedom of contract are severely skewed where it appears that had the party actually been aware of the term to which he "agreed" or had he any real choice in the matter, he would never have assented to inclusion of the term⁸⁹

In short, the court found, probably correctly, that the mere fact that a transaction takes place in a commercial context does not mean that it cannot be adhesive. Disparity of bargaining power or other circumstances may still translate into the reality that one side has no choice. Needless to say, this analysis can be carried on endlessly because there are always degrees of disparity of bargaining power between parties; in

88. See *supra* notes 58-69 and accompanying text.

89. 135 Cal. App. 3d at 489-90, 186 Cal. Rptr. at 124 (citations omitted).

a real sense, any contract term may be agreed upon finally because the party has decided it has reached the extent of its bargaining power, and therefore has no "choice" to further negotiate a term. The commercial-consumer distinction is a helpful "bright line" to prevent this sort of slippery analysis.

The court then found that the transaction in question was procedurally unconscionable.⁹⁰ First, the element of surprise was present since the disclaimer provisions appeared in the middle of the back page of a long form (*i.e.*, adhesion) contract which the defendant was shown only casually. The defendant never read the other side, nor was it suggested to him that he do so. The court decided somewhat cryptically that this "surprise" was sufficiently "unfair" or "oppressive" (although it did recognize that this was open to some dispute, since the defendant certainly had the opportunity to read the form or to seek the advice of a lawyer), because

[a]s a factual matter, given the complexity of the terms and FMC's failure to direct his attention to them, [the defendant's] omission may not be totally unreasonable "The burden should be on the party submitting [a standard contract] in printed form to show that the other party had knowledge of any unusual or unconscionable terms contained therein."⁹¹

The court stressed that the element of unfair surprise was most strongly supported by the fact that the contract was a form contract and one of adhesion. There was a "lack of any real negotiation."⁹²

The court determined that the disclaimers, too, in question were substantively unconscionable. Its overall conclusion was:

When non-negotiable terms on preprinted form agreements combine with disparate bargaining power, resulting in the allocation of commercial risks in a socially or economically unreasonable manner, the concept of unconscionability as codified in Uniform Commercial Code sections 2-302 and 2-719, subdivision (3), furnishes legal justification for refusing enforcement of the offensive result.⁹³

What the *A & M Produce* decision really does, apart from its rather questionable judicial intrusiveness and determination of social policy, is to put adhesion theory in its proper place. As suggested less

90. *Id.* at 490, 186 Cal. Rptr. at 124.

91. *Id.* at 490, 186 Cal. Rptr. at 124 (quoting *Weaver v. American Oil Co.*, 257 Ind. 458, 462, 276 N.E.2d 144, 147-48 (1972)).

92. 135 Cal. App. 3d 491, 186 Cal. Rptr. at 125.

93. *Id.* at 493, 186 Cal. Rptr. at 126.

directly in *Graham v. Scissor-Tail, Inc.*,⁹⁴ *Hope v. Superior Court*,⁹⁵ and *Beynon v. Garden Grove Medical Group*,⁹⁶ there should be no specialized "adhesion theory" at all. Instead, the adhesive nature of a contract should be simply a factor to be taken into account in determining procedural unconscionability.⁹⁷ Indeed, the earlier article suggested that "adhesion theory" may be no more than covert unconscionability.⁹⁸

IV. CONCLUSION

The courts have finally shown some sign, in *Graham v. Scissor-Tail, Inc.* and subsequent cases, that adhesion theory may be restricted to procedural aspects of contract entry, *i.e.*, requiring notice of all terms, and turning to unconscionability or public policy to deal with egregious substantive terms. *A & M Produce*, while otherwise a rogue decision, may be a step in that direction. However, the decisions have largely continued to refer to the adhesive nature of a contract in striking down terms better dealt with, or actually dealt with, under other rubrics. This approach has been extended both to commercial cases and to cases where there may be *no* disparity of bargaining power. In other cases, such as *Jones*,⁹⁹ the doctrine has simply been misused. The recent signs of a possible trend to the contrary should be encouraged to reach the goal of an end to sloppy reasoning in support of judicial activism.

94. See *supra* notes 58-69 and accompanying text.

95. See *supra* notes 70-75 and accompanying text.

96. See *supra* notes 27, 38-57 and accompanying text.

97. The court was almost certainly correct that unconscionability is still available in this state. See *Sybert*, *supra* note 1, at 300 nn.19-24, 317 nn.132-34.

98. See *Sybert*, *supra* note 1, at 317 n.138. Both *Tunkl*, see *supra* note 30 and accompanying text, and *Akin v. Business Title Corp.*, 264 Cal. App. 2d 153, 70 Cal. Rptr. 287 (1968), were decided on the ground of "public policy," although adhesive factors played a part in the courts' reasonings.

99. See *supra* notes 18-23 and accompanying text.

